STATE OF MICHIGAN

IN THE SUPREME COURT

ARTHUR T. JARRAD,

Plaintiff-Appellee,

v

INTEGON NATIONAL INSURANCE COMPANY, a foreign insurer, a GMAC INSURANCE COMPANY,

Defendant-Appellant.

Supreme Court Case No. 126176

Court of Appeals Case No. 245068

Lower Court Case No. 00-92678-NF
(Ingham County Circuit Court)

George T. Sinas (P25643)
L. Page Graves (P51649)
Sinas, Dramis, Brake, Boughton & McIntyre, P.C.
Attorneys for Plaintiff-Appellee
3380 Pine Tree Road
Lansing, Michigan 48911-4207
(517) 394-7500

James L. Borin (P11013)
Daniel S. Saylor (P37942)
Garan Lucow Miller, P.C.
Attorneys for Defendant-Appellant
1000 Woodbridge Street
Detroit, MI 48207-3192
(313) 446-5520

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* * *

PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE

* * *

Dated: **May 28, 2004**

Prepared by:

George T. Sinas (P25643)
L. Page Graves (P51649)
SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
Attorneys for Plaintiff-Appellee
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500

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LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

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48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

QUESTION PRESENTED
DEMONSTRATING WHY REVIEW IS UNNECESSARY

I. WHETHER THE COURT SHOULD DENY APPLICATION FOR LEAVE AND REJECT APPELLANT'S INVITATION TO OVERRIDE 19 YEARS OF APPELLATE CASE LAW THAT PROHIBITS NO-FAULT WAGE LOSS BENEFITS FROM BEING REDUCED BY WAGE CONTINUATION BENEFITS THAT ARE PAID GRATUITOUSLY BY AN EMPLOYER?

The Circuit Court answered "Yes."

The Court of Appeals answered "Yes."

Plaintiff-Appellee answers "Yes."

Defendant-Appellant would answer "No."

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& McINTYRE, P.C.

3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

JUDGMENT BEING APPEALED AND REASON FOR DENIAL OF APPLICATION FOR LEAVE

Appellant seeks leave to appeal the Court of Appeals' Opinion which followed 19 years of appellate case law interpreting MCL 500.3107(1)(b) and 500.3109a which prohibits no-fault wage loss benefits from being reduced by wage continuation benefits that are paid gratuitously by an employer. For the reasons stated herein, this Court is respectfully urged to deny the Appellant's Application for Leave.

In a uncoordinated no-fault benefit situation, wage continuation benefits may not be offset because they are not payable for work performed by the employee after the accident. *See, Brashear v DAIIE,*144 Mich App 667 (1985). In a coordinated no-fault benefit situation, wage continuation benefits may not be offset because they are not considered other health and accident coverage. *See, Spencer v Hartford Accident and Indemnity Co,* 179 Mich App 389 (1989) and *Wesolek v City of Saginaw,* 202 Mich App 637 (1993). In the instant case, it is undisputed by the Appellant that the wage continuation benefits paid to Appellee by his employer were self-funded by contributions from Appellee and his employer and were payable because of a collective bargaining agreement, and not an insurance policy. *Cf, Rettig v Hastings Mutual Ins Co,*196 Mich App 329 (1992). Based upon the foregoing, Appellant was prohibited from offsetting Appellee's no-fault wage loss benefits with his wage continuation benefits paid gratuitously by his employer.

Finally, it is not true, nor has Appellant demonstrated to the contrary in the record below, that policyholders in general and Appellee in particular receive any level of premium reduction because of their eligibility for wage continuation benefits. The reason

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3380 PINE TREE ROAD
LANSING, MICHIGAN
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TELEPHONE 517-394-7500
FAX 517-394-7510

for this lack of proof is that it has been well settled for almost 20 years that wage continuation benefits are not proper offsets against no-fault wage loss benefits. Therefore, no knowledgeable underwriter ever would have considered their availability as having any relevance to the issue of premium determination.

Appellant's dispute is motivated solely by its displeasure with the law instead of traditional grounds for institutional review. MCR 7.302(B). When the Legislature enacted MCL 500.3109a of the No-Fault Act in 1974, it expressly considered and rejected the Appellant's desired outcome that it has unlawfully imposed upon Appellee in this case, i.e., offsetting his no-fault wage loss benefits with his wage continuation benefits that were self-funded by payroll contributions from Appellee and his employer and payable pursuant to a collective bargaining agreement. The proper venue for Appellant's disagreement with § 3109a of the No-Fault Act is the State Legislature which has the sole, constitutional authority to amend the statute. Const 1963, art 4, § 1.

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

COUNTER-STATEMENT OF FACTS

This case arises from an automobile accident that occurred on June 27, 1999, causing accidental bodily injury to Appellant's insured, Appellee, Arthur T. Jarrad. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶1]. Beginning in 1992, Appellee was employed as a Corrections Officer for the State of Michigan, assigned to its Huron Valley Men's Facility in Ypsilanti, Michigan. As of June 27, 1999, Appellee continued to work in this capacity at the Ypsilanti facility.

At said time and date, Appellee was a member of the Michigan Corrections Organization Service Employees International Union (SEIU) Local 526M, AFL-CIO. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶5(A)]. At said time and date, Appellee was earning $19.40 per hour for a 40 hour week. [*Id*, ¶10(A) and Exhibit 1, attached to Plaintiff's Brief In Support of Motion for Partial Summary Disposition.] Based upon Appellee's stated earnings, his average monthly wage, including overtime, equaled approximately $4,688.02. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶6].

When Appellee's automobile accident occurred on June 27, 1999, there existed a binding and enforceable Security Unit Agreement, otherwise called a collective bargaining agreement, between his Union and his employer. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶5 and Exhibit 2(B), attached to Plaintiff's Brief In Support of Motion for Partial Summary Disposition.] As part of this collective bargaining agreement, a wage continuation plan was made available to eligible state employees,

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

including Appellee. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶5 and Exhibit 2(A), attached to Plaintiff's Brief In Support of Motion for Partial Summary Disposition.]

Attached as Exhibit 2, to Plaintiff's Brief In Support of Motion for Partial Summary Disposition is the Verified Affidavit of Ken Swisher, who is the State of Michigan's Director of Employee Health Management. Mr. Swisher's Affidavit documented that Appellee's wage continuation plan was not mandated by State or Federal law. [*Id*, ¶3] It further documented that Appellee's wage continuation plan was entirely self-funded (100%), primarily by pay-roll contributions of eligible State employees and secondarily, by pay-roll matching contributions by the State employer. [*Id*, ¶4] In this regard, Appellee's last Statement of Earnings and Deductions, documented under the heading *"LTD"* that Appellee contributed $31.69 toward his wage continuation plan; it also documented that the State contributed $25.42 as its matching contribution to the plan. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶10(A).]

Finally, Mr. Swisher's Affidavit verified and documented the authenticity and accuracy of the wage continuation plan documents, which were attached to his Affidavit as Exhibits A and B. [*See*, Plaintiff's Brief In Support of Motion for Partial Summary Disposition, Exhibit 2, ¶¶2 and 7.] Parenthetically, payments made pursuant to the wage continuation plan were administered by a third-party, Aetna US Healthcare, located in Grand Rapids, Michigan, pursuant to contract with the State of Michigan. [*Id*, ¶5)

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3380 PINE TREE ROAD
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TELEPHONE 517-394-7500
FAX 517-394-7510

Because of his disabling injuries caused by the automobile accident of June 27, 1999, Appellee was not able to return to work. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶2.] Because of this fact, Appellee received wage continuation payments pursuant to his wage continuation plan through the State of Michigan. The plan's calculation of Appellee's monthly wage continuation payment was $2,220.24. (Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶5(H).]

Also, because Appellee's disabling injuries arise out of the automobile accident of June 27, 1999, Appellant did not dispute that Appellee was is entitled to claim and be paid no-fault wage loss benefits pursuant to § 3107(1)(b) of the Michigan No-fault Insurance Act (MCL 500.3101 *et seq*). [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶3.] Appellant, however, unlawfully set-off the value of Appellee's wage continuation payments from all of his no-fault wage loss benefits that ended on June 27, 2002. [*Id*, ¶ 7)

On or about November 3, 2000, Appellee filed his lawsuit seeking full payment of all no-fault benefits to which he was entitled under the No-Fault Act, including full payment of his wage loss. Appellant, however, maintained as two of its Affirmative Defenses Nos. 3 and 5, respectively, that pursuant to §3109(1) and/or §3109a, it was entitled to subtract or setoff from Appellee's monthly no-fault wage loss benefit, the amount Appellee received each month under his wage continuation plan. It was from this entire factual background that Appellee filed his Motion for Partial Summary Disposition. Significantly, Appellant maintained these defenses despite expressly acknowledging that

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

binding case law precedent directly on point rejected the exact same defenses raised by no-fault insurers before it. [Exhibit 1, March 27, 2002 Trial Court Tr, p 8.]

By asserting that §3109(1) sanctioned its claimed set-off, Appellant affirmatively raised the issue of whether the aforementioned self-funded, wage continuation plan was *"provided or required to be provided under the laws of any state or federal government."* [Defendant's February 1, 2001 Affirmative Defenses, ¶3.] Appellee successfully defeated Appellant's § 3109(1) affirmative defense by irrefutably proving that the self-funded, wage continuation plan is not provided or required to be provided by state or federal law but rather, is payable pursuant to a negotiated collective bargaining agreement between his union and his employer. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶5.] Based upon this precise factual distinction and binding case law directly on point, the Circuit Court agreed with Appellee that §3109(1) did not sanction Appellant's claimed right of set-off. [Exhibit 1, March 27, 2002 Trial Court Tr, p 10.] In granting partial summary disposition in favor of Appellee in this regard, the Trial Court stated in pertinent part:

> *". . . First of all, section 3109(1) clearly has* ***no application*** *to the facts of this case because the wage continuation benefit at issue in this case was not created or* ***required by any federal or state law. It's purely a matter of a private collective bargaining agreement.***"
> (emphasis added)

On appeal, Appellant abandoned its §3109(1) affirmative defense. [Appellant's March 12, 2003 Brief on Appeal.]

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

By asserting that §3109a sanctioned its claimed set-off, Appellant affirmatively raised two (2) substantive sub-issues. [Defendant's February 1, 2001 Affirmative Defenses, ¶ 5.] The first issue raised was whether Appellee's self-funded wage continuation plan constituted *"other health or accident coverage"* as contemplated by §3109a. The second issue raised was whether Appellant's policy's coordination language violated the No-Fault Act, as a matter of law. [Plaintiff's March 25, 2002 Reply Brief In Support of Motion for Partial Summary Disposition, pp 5-6.]

Appellee successfully defeated Appellant's §3109a affirmative defense. First, Appellee undisputedly proved that the subject ***wage continuation plan*** is not funded or underwritten by *insurance "coverage"* but rather, is self-funded. [Plaintiff's March 4, 2002 Motion for Partial Summary Disposition, ¶ 5; Plaintiff's Brief In Support of His Motion for Partial Summary Disposition, Exhibits 1 and 2.] Secondly, binding case law precedent confirmed that the legislative history of §3109a purposefully excluded wage continuation plans from consideration, contrary to Appellant's policy's broader coordination language which includes it in direct violation of the No-Fault Act. [Plaintiff's March 25, 2002 Reply Brief In Support of Motion for Partial Summary Disposition, pp 5-6.]

Based upon these precise factual distinctions and binding case law directly on point, the Circuit Court agreed with Appellee that the legislative intent of §3109a did not sanction its claimed right of set-off. Moreover, the Circuit Court agreed with Appellee that Appellant's claimed right of set-off pursuant to it policy's coordination language violates

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3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

the No-Fault Act, as a matter of law. [Exhibit 1, pp 10-11] In granting partial summary disposition in favor of Appellee in this regard, the Circuit Court stated in pertinent part:

> *"Secondly, I am persuaded that at this time* ***case law does clearly hold that the legislature intended section 3109a only to apply to wage continuation benefits which are funded by insurance as opposed to wage continuation benefits which are self funded****. That is not as arbitrary as it at first may sound, because I agree with the Defendant that there's a clear legislative policy behind the statute, and that is, to trade – or to mandate, I should say, the trading of a class of lower premium insurance policies in return for the acceptance by the consumer of coordination of benefits, but in this fact situation we're not talking about a consumer buying an insurance policy. We're talking about a consumer being part of a bargaining unit which collectively bargained a self-funded,* ***non-insurance funded*** *wage continuation benefit. That legislative policy does not apply to this fact situation,* ***nor can the language of Defendant's insurance contract override the statute's requirements, because no fault insurance is a product mandated by statute and defined by statute, and, therefore, the attempt by the Defendant to write an insurance contract that would include self-funded wage continuation benefits in the class of those benefits to be coordinated must fall because it violates the statutory mandate****."*
> (emphasis added)

On April 8, 2002, the Circuit Court entered its Order Granting Partial Summary Disposition in favor of Appellee. Thereafter, on July 31, 2002, the Circuit Court granted Appellee's Motion for §3148 no-fault penalty attorney fees. The Circuit Court ruled that Appellant's claimed set-off in this case was unreasonable as contemplated by §3148, in light of the unequivocally clear and binding case law. [Exhibit 2, July 31, 2002 Trial Court Tr, pp 13-14). In this regard, the Circuit Court held:

> *"With respect to the issue which I resolved at a hearing back in March – on March 27th, I agree with the Plaintiff that* ***the existing case law did not justify the Defendant in taking the position that the Defendant took.*** *I think it is fair to say that the Defendant was and remains hopeful that the present composition of the Michigan appellate courts would reverse* ***the case law which clearly and unequivocally leads to the result that I reached and which favored Plaintiff on this issue, but that is not what I think of as a bona fide dispute on***

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3380 PINE TREE ROAD
LANSING, MICHIGAN
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TELEPHONE 517-394-7500
FAX 517-394-7510

statutory construction. There was clear precedent, *so I believe the Plaintiff is entitled to fees for preparation and argument of that issue."*
(emphasis added)

On August 19, 2002, the Circuit Court entered its Order granting §3148 no-fault penalty attorney fees. Thereafter, the parties resolved the outstanding issues and a Judgement in favor of Plaintiff, as amended, was entered on October 31, 2002. Quite telling of its express acknowledgment that the existing case law is indeed controlling, on November 18, 2002, the Appellant satisfied that portion of the Judgement that represented §3148 no-fault penalty attorney fees.

Appellant challenged, as a matter of right, the Circuit Court's ruling regarding its affirmative defense that both §3109a and its policy's coordination language sanction its claimed right of set-off. [Appellant's March 12, 2003 Brief on Appeal.] In an Opinion dated January 27, 2004, the Court of Appeals affirmed the Circuit Court's rulings and in doing so, followed 19 years of appellate case law interpreting MCL 500.3107(1)(b) and 500.3109a which prohibits no-fault wage loss benefits from being reduced by wage continuation benefits that are paid gratuitously by an employer. [Exhibit 3, Slip Opinion dated January 27, 2004.] Appellant unsuccessfully filed a Motion for Rehearing which was denied on April 1, 2004.

Appellant filed this Application for Leave motivated solely by its displeasure with the law instead of traditional grounds for institutional review. MCR 7.302(B).

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

ARGUMENT

I.

THE COURT SHOULD DENY APPLICATION FOR LEAVE AND REJECT APPELLANT'S INVITATION TO OVERRIDE 19 YEARS OF APPELLATE CASE LAW THAT PROHIBITS NO-FAULT WAGE LOSS BENEFITS FROM BEING REDUCED BY WAGE CONTINUATION BENEFITS THAT ARE PAID GRATUITOUSLY BY AN EMPLOYER.

Appellant seeks leave to appeal the Court of Appeals' Opinion which followed 19 years of appellate case law interpreting MCL 500.3107(1)(b) and 500.3109a which prohibits no-fault wage loss benefits from being reduced by wage continuation benefits that are paid gratuitously by an employer. Appellant's dispute is motivated solely by its displeasure with the law instead of traditional grounds for institutional review. MCR 7.302(B). Grounds for institutional review are limited. That is because the Court's time and resources, similarly, are limited given the shear volume of applications for leave filed each year. Accordingly, only those cases presenting a conflict of authority or an issue affecting a significant number cases, for example, demonstrate a showing for institutional review. Notably absent from Appellant's application are these required criteria. Consequently, leave should be denied.

A. In a uncoordinated no-fault benefit situation, wage continuation benefits may not be offset because they are not payable for work performed by the employee after the accident.

The Michigan Court of Appeals has consistently held that the No-Fault Act does not sanction a no-fault insurer's effort to reduce no-fault wage loss by wage continuation benefits gratuitously paid by the insured's employer. The birth of this black letter rule

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

came from *Brashear v DAIIE*, 144 Mich App 667 (1985), involving an uncoordinated no-fault situation where the Court of Appeals analyzed whether an injured individual suffers wage loss under §3107(1)(b), notwithstanding when an employer continues to pay the injured person's wages during the period of his or her disability pursuant to a wage continuation plan or as a gratuity.

Deeming the issue one of first impression, the court sought guidance from the Uniform Motor Vehicle Accident Reparations Act (UMVARA), to assist it in its determination of the Michigan Legislature's intent with regard to enacting §3107(1)(b). In particular, the court noted with approval that the drafters of the UMVARA did not view employer paid gratuities or wage continuation plans as wages because neither are paid for work done during the employee's absence. In this regard, the court quoted with approval that:

> *"'Work loss', as are other components of loss, is restricted to accrued loss, and thus covers only actual loss of earnings as contrasted to loss of earning capacity. Thus, an unemployed person suffers no work loss from injury until the time he would have been employed but for his injury. On the other hand, an employed person who loses time from work he would have performed had he not been injured has suffered work loss,* ***even if his employer continues his wages under a formal wage continuation plan or as a gratuity. Employer payments in this situation are collateral source payments rather than wages since they are not payments for work done during the time the employee is absent.***"
> *Brashear*, 144 Mich App at 671 (emphasis added)

Finding this language dispositive, the court held that an injured individual does suffer wage loss under §3107(1)(b), notwithstanding when an employer continues to pay wages pursuant to a wage continuation plan or as a gratuity.

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

B. ***In a coordinated no-fault benefit situation, wage continuation benefits may not be offset because they are not considered other health and accident coverage.***

The evolution of the reasoning for the rule announced in *Brashear* was furthered in a coordinated no-fault situation in *Spencer v Hartford Accident and Indemnity Co*, 179 Mich App 389 (1989). In *Spencer,* the Court of Appeals held that a that a no-fault insurer cannot, under either §3109(1) or §3109a, set-off from no-fault wage loss benefits, that which an insured receives under a self-funded, wage continuation plan. In *Spencer,* the plaintiff was involved in a motor vehicle accident while in the course of his employment with the Township of Ypsilanti. In addition to workers' compensation benefits available to the plaintiff, he also was eligible to receive monthly wage continuation payments pursuant to a negotiated collective bargaining agreement provision between his union and his employer. *Spencer,* 179 Mich App at 391. The plaintiff further applied for no-fault work loss benefits. The defendant no-fault insurer claimed, however, that the plaintiff's wage continuation benefits should be set-off against his no-fault wage loss benefits as either a governmental benefit under §3109(1), or alternatively as a coordinated set-off under §3109a. *Id.* The court rejected each claimed set-off, separately.

The court in *Spencer* first analyzed §3109(1). Section 3109(1), provides that:

> *"Benefits* ***provided or required to be provided under the laws of any state*** *or federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."*
> (emphasis added)

Finding the language of §3109(1) clear and unambiguous, the court dismissed the defendant insurer's notion that because state law authorized the township to act, that

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

plaintiff's collective bargaining agreement therefore constituted a benefit required by state law within the meaning of §3109(1). Consequently, the court held the defendant insurer's claimed right of set-off was not sanctioned by §3109(1). In this regard, the court stated at pages 393-394:

> *"Here, the defendant contends because plaintiff received the remainder of his wages pursuant to a collective bargaining agreement with a township and MCL 41.2; MSA 5.2 authorizes townships to make all contracts necessary and convenient for the exercise of their corporate powers, the collective bargaining wage continuation benefits constitute a benefit provided by state law within the meaning of § 3109(1).*
>
> ***§3109(1) is clearly limited to benefits 'provided under the laws of any state or the federal government.' The additional benefits paid in the instant case were not paid pursuant to any state or federal law as required by § 3109, but instead were paid pursuant to a collective bargaining agreement with a local township. Thus, the express language of the statute refutes the applicability of a setoff under the instant circumstances."***
> (emphasis added)

The court in *Spencer*, then addressed the defendant insurer's alternative claim that §3109a sanctioned its set-off of the plaintiff's self-funded, wage continuation plan. The defendant insurer maintained that the wage continuation plan constituted *"other health and accident coverage"* within the meaning of §3109a. Section 3109a provides:

> *"An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident* ***coverage*** *on the insured."*
> (emphasis added)

The court analyzed the legislative history and intent of §3109a and concluded that the defendant insurer's claimed right of set-off was not sanctioned by §3109a. In reaching its holding, the court first analyzed the term *"coverage"* and relied on the Michigan Supreme

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

Court decision in *LeBlanc v State Farm Mutual Automobile Ins Co*, 410 Mich 173 (1981), for guidance.

In *LeBlanc*, the court held that because the word "*coverage*" was a word of precise meaning in the insurance industry, it was intended to refer to protection afforded and underwritten by an insurance policy. In this regard, the court in *LeBlanc* stated at page 204, in pertinent part:

> *". . . the Legislature's choice of the word 'coverage' to delineate the perimeters of § 3109a was 'noninadvertent'. We are also of the view that the Legislature's enactment of § 3109a,* ***which is narrowly limited to 'coverage'*** *and which is not expressly confined to private forms of such 'coverage', evinces an intent to provide unique treatment to health and accident* ***insurance****, as opposed to other perhaps equally duplicative 'benefits'."*
> (emphasis added)

Given this framework, the court in *Spencer* held that the plaintiff's wage continuation plan was not afforded and underwritten by an insurance policy and therefore, could not be set-off under §3109a against his no-fault wage loss benefits. In this regard, the court stated in pertinent part:

> *"The Michigan Supreme Court's ruling in LeBlanc, supra, which construed the term 'coverage' to mean* ***protection afforded by an insurance policy,*** *is consistent with this construction."*
> 179 Mich App at 400 (emphasis added)

Moreover, the court in *Spencer* also noted with approval that the legislative history and intent of enacting §3109a, supported its conclusion. The court specifically referred to §14(b)(2) of the UMVARA, the counter part to §3109a. Interestingly, the court determined that the Legislature elected to adopt a more limited version of the uniform act; in doing so, the Legislature rejected a broader form which included language that would have

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

expressly made wage continuation plans subject to set-off under §3109a. Therefore, the court held that by rejecting the broader form, the Legislature did not intend to permit a set-off under §3109a of the Michigan act, where an injured person also was receiving wage continuation payments. In this regard, the court in *Spencer* held:

> ***"[U]nder the UMVARA, wage continuation benefits pursuant to a union agreement were intended to be coordinated with no-fault benefits otherwise payable. Instead of adopting the broader language of the uniform act, the Michigan act was drafted much more narrowly, and limited coordination to 'other health and accident coverage.' It appears, therefore, that in enacting the Michigan act the Legislature did not intend for no-fault benefits to be coordinated with a broad array of other benefits which may perhaps be equally duplicative. . . .***
>
> ***We therefore conclude the Legislature did not intend that § 3109a mandate coordination of benefits as received by plaintiff in the instant case.*** *Although such a conclusion may ofttimes result in a plaintiff's receipt of duplicative work loss type benefits,* ***such an interpretation is supported by prior case law as well as the Legislature's decision to reject the broad language contained in the UMVARA which would have clearly brought such benefits within the intent of the provision."***
> *Id* (emphasis added)

In another coordinated no-fault situation, the Court of Appeals distinguished *Spencer* when it next faced a §3109a setoff question involving a long-term disability policy that was underwritten by insurance coverage. *Rettig v Hastings Mutual Ins Co*, 196 Mich App 329 (1992). Importantly, the facts did not involve self-funded wage continuation benefits gratuitously paid by an employer through a formal wage continuation plan pursuant to a collective bargaining agreement. In *Rettig,* the plaintiff was involved in a motor vehicle accident, causing him to miss time away from work. At the time of his accident, the plaintiff had available through his employer a long-term disability insurance

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3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

policy. Pursuant to § 3109a, the defendant no-fault insurer set-off plaintiff's no-fault wage loss benefits by the amount he received pursuant to the long-term disability insurance policy. The court in *Rettig* held that the claimed right of set-off was sanctioned by §3109a.

In reaching its holding, the court applied the exact same analysis and reasoning utilized by the Court of Appeals in *Spencer, supra.* The court in *Rettig* similarly followed the holding in *LeBlanc, supra,* that the term "coverage" in §3109a was a word of precise meaning and was intended to refer to protection provided by an insurance policy. *Rettig,* 196 Mich App at 332. Since Mr. Rettig's long-term disability plan was afforded and underwritten by an insurance policy, the court found this fact dispositive and distinguishable from the holding in *Spencer.* In this regard, the court stated:

> *"Contrary to plaintiff's contention, we do not believe that our holding conflicts with Spencer. . . . There, this Court observed that under the [UMVARA],* ***wage continuation benefits*** *. . . were intended to be incorporated with no-fault benefits, but that* ***the Michigan version of the uniform act contained more restrictive language and limited coordination of benefits to insurance coverage. In contrast to Spencer, the long-term disability benefits in this case were provided to plaintiff by Reliance Standard Life Insurance Company pursuant to an insurance policy****. . . . Accordingly, we conclude that defendant is entitled to an exclusion up to the amount of the long-term disability benefits plaintiff received because the benefits constituted 'other health and accident coverage' under §3109a."*
> *Id,* at 333 (emphasis added)

In another coordinated no-fault situation, the Court of Appeals distinguished *Rettig* and instead, relied specifically on *Spencer, supra,* for its decision in *Wesolek v City of Saginaw,* 202 Mich App 637 (1993). In *Wesolek,* the plaintiff was injured in a motor vehicle accident while on-duty as a police officer. Similar to the plaintiff in *Spencer,* Mr. Wesolek received workers' compensation benefits and wage continuation plan benefits pursuant to a

SINAS DRAMIS LAW FIRM

SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

negotiated collective bargaining agreement between his union and his employer. *Wesolek,* 202 Mich App at 638-639. Mr. Wesolek also applied for no-fault wage loss benefits but the defendant denied his claim, in essence attempting to re-litigate *Spencer, supra,* by claiming a right of set-off under either §3109(1) or §3109a of the No-Fault Act. The trial court rejected the defendant's efforts. On appeal, the defendant insurer apparently abandoned its § 3109a argument, leaving only § 3109(1) for consideration. The Court of Appeals similarly rejected the defendant insurer's effort to re-litigate *Spencer,* and held the claimed right of set-off was not sanctioned by §3109(1). Finding *Spencer* dispositive, the court stated at pages 640-641, in pertinent part:

> *"**Wage continuation benefits** received under a collective bargaining agreement were found inappropriate for setoff under § 3109 in Spencer v Hartford Accident & Indemnity Co, . . . where this Court held that the benefits were not paid pursuant to any state or federal law. . . . The wage continuation benefits were paid pursuant to a collective bargaining agreement between the plaintiff's union and Ypsilanti Township. * * **
>
> ***Similarly, in the present case, we find that plaintiff's duty disability pension benefits were not paid pursuant to any state of federal law as required by § 3109. As in Spencer, plaintiff's duty disability benefits were paid pursuant to a collective bargaining agreement and were not received in lieu of workers' compensation benefits. . . . Accordingly, we cannot agree that the trial court erred in ruling these benefits inappropriate for setoff under § 3109."***
> (emphasis added)

This entire body of law prohibiting no-fault wage loss benefits from being reduced by self-funded wage continuation benefits that are paid gratuitously by an employer has been consistently followed for the past 19 years.

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

C. ***In the instant case, the wage continuation benefits paid to Appellee by his employer could not be offset under his coordinated no-fault policy because those benefits were self-funded by contributions from the employee and the employer and were payable because of a collective bargaining agreement, and not an insurance policy.***

In this case, Appellee's formal wage continuation plan was self-funded by payroll contributions from himself and his employer, pursuant to a collective bargaining agreement. Importantly, Appellee's wage continuation plan was not underwritten by insurance coverage. Based upon the foregoing, the Circuit Court and the Court of Appeals held that Appellant's claimed set-off was not sanctioned by the legislative intent of §3109a of the No-Fault Act. Consistent with the Legislature's intent in enacting §3109a, that very fact is what brings this case within all fours of *Spencer and Wesolek, supra,* and distinguishes it from the opposite result reached in *Rettig, supra.*

In these cases, the Court of Appeals determined that in enacting §3109a, the Michigan Legislature expressly rejected the broader form of the UMVARA by excluding wage continuation plans from coordination and instead, limited coordination solely to *"other health and accident* ***coverage.***" *Spencer,* 179 Mich App at 400; *Rettig,* 196 Mich App at 332. Adhering to the doctrine of *stare decisis,* in both cases the Court of Appeals followed the Supreme Court's decision in *LeBlanc, supra,* where it interpreted the term "*coverage*" to mean protection afforded and underwritten by an *"insurance policy."* *Spencer,* 179 Mich App at 400; *Rettig,* 196 Mich App at 332-333.

The Supreme Court's interpretation of the term "*coverage*" in *LeBlanc,* is entirely consistent with its current and repeated principle of statutory construction to *"give the*

SINAS DRAMIS LAW FIRM

SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

words of a statute their plain and ordinary meaning. . . ." DiBenedetto v West Shore Hosp, 461 Mich 394, 402. In that regard, the Supreme *"Court often consults dictionary definitions to ascertain the generally accepted meaning of a term. . . ." Consumers Power Co v Public Service Comm*, 460 Mich 148, 163, n 10 (1999). By way of example, the Supreme Court commonly refers to *The American Heritage Dictionary, Second College Ed,* as an authoritative resource. *Robinson v City of Detroit*, 462 Mich 439, 456 (2000). According to *The American Heritage Dictionary, Second College Ed,* the term *"coverage"* is defined as *"2. The protection afforded by insurance."* Id, p 166 (emphasis added). This definition is the commonly accepted meaning according to several other dictionary resources. *See, e.g., Webster's New Twentieth Century Dictionary*, p 421 (*"coverage, . . . 2. in insurance, all the risks covered by an insurance policy."*); *Black's Law Dictionary, 5th Ed*, p 330 (*"Coverage. In insurance, amount and extent of risk covered by insurer."*).

In *Spencer*, the subject wage continuation plan was *not* underwritten by an insurance policy. Therefore, the claimed set-off was *not* sanctioned by § 3109a. *Spencer*, 179 Mich App at 400. Conversely, in *Rettig*, the subject wage continuation plan *was* underwritten by an insurance policy; therefore, the claimed set-off *was* sanctioned by § 3109a. *Rettig*, 196 Mich App at 333. The court in *Rettig* made this *insurance policy* distinction very clear when it stated, in pertinent part:

> *"Contrary to plaintiff's contention, we do not believe that our holding conflicts with Spencer. . . . There, this Court observed that under the [UMVARA],* ***wage continuation benefits*** *. . . were intended to be incorporated with no-fault benefits, but that* ***the Michigan version of the uniform act contained more restrictive language and limited coordination of benefits to insurance coverage. In contrast to Spencer, the long-term disability benefits in this case were***

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SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

> ***provided to plaintiff by Reliance Standard Life Insurance Company pursuant to an insurance policy.*** *. . . . Accordingly, we conclude that defendant is entitled to an exclusion up to the amount of the long-term disability benefits plaintiff received because the benefits constituted 'other health and accident coverage' under § 3109a."*
> *Id* (emphasis added)

In the case below, the Circuit Court agreed with Appellee that because his wage continuation plan was self-funded, the legislative intent of §3109a did not sanction Appellant's claimed right of set-off. [Exhibit 1, March 27, 2002 Trial Court Tr, p 10.] In granting partial summary disposition in favor of Appellee in this regard, the Circuit Court stated in pertinent part:

> *"Secondly, I am persuaded that at this time* ***case law does clearly hold that the legislature intended section 3109a only to apply to wage continuation benefits which are funded by insurance as opposed to wage continuation benefits which are self funded****. That is not as arbitrary as it at first may sound, because I agree with the Defendant that there's a clear legislative policy behind the statute, and that is, to trade – or to mandate, I should say, the trading of a class of lower premium insurance policies in return for the acceptance by the consumer of coordination of benefits, but in this fact situation we're not talking about a consumer buying an insurance policy. We're talking about a consumer being part of a bargaining unit which collectively bargained a self-funded,* ***non-insurance funded*** *wage continuation benefit.* ***That legislative policy does not apply to this fact situation.*** *. . ."*
> (emphasis added)

The Court of Appeals agreed with the Circuit Court and in doing so, followed 19 years of appellate case law interpreting MCL 500.3107(1)(b) and 500.3109a which prohibits no-fault wage loss benefits from being reduced by wage continuation benefits that are paid gratuitously by an employer. [Exhibit 3, Slip Opinion dated January 27, 2004.] In this regard, the court stated in pertinent part:

SINAS DRAMIS LAW FIRM

SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

> *"**This case, however, is more like Spencer** than Rettig. In Spencer, the plaintiff received work loss benefits from his employer through a formal wage continuation plan pursuant to a collective bargaining agreement. Id. at 391-392. **This Court noted that, although the Uniform Motor Vehicle Accident Reparations Act (UMVARA)-an act from which our no-fault act was modeled-provided for the coordination of wage continuation benefits derived from union agreements, our Legislature rejected that provision and adopted a narrower provision limited to coordinating 'other health and accident coverage.'** Id. at 400. Accordingly, the defendant in Spencer was not entitled to set-off its payment of work loss no-fault benefits by the amount of wage continuation benefits the plaintiff received through his employment. Id. **Similarly, here, plaintiff received wage loss benefits from his employer through a formal wage continuation plan pursuant to a collective bargaining agreement. Consistent with established precedent, we agree with the trial court and conclude that those wage continuation benefits are not "other health and accident coverage" within the contemplation of MCL 500.3109a. Affirmed."***
> (emphasis added)

The Legislature expressly considered and rejected the Appellant's desired language when it enacted §3109a back in 1974. Ever since, the Legislature has acquiesced in the Court of Appeals' consistent construction of §3109a, by its inaction to amend the language of the construed statute. The proper venue for Appellant's disagreement with the current version of §3109a is the State Legislature, which has the sole constitutional authority to amend the statute. Const 1963, Art 4, §1.

D. It is not true, nor has it been demonstrated to the contrary in this case that policyholders in general and Appellee in particular received any level of premium reduction because of their eligibility for wage continuation benefits, in as much as it has been well settled for almost 20 years that wage continuation benefits are not proper offsets against no-fault wage loss benefits.

Appellant never made a factual record below that demonstrated that it actually reduced Appellee's coordinated no-fault policy premium by one single penny because of his eligibility to receive self-funded, wage continuation benefits. The reason for this lack

SINAS DRAMIS LAW FIRM

SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510

of proof is that it has been well settled for almost 20 years that wage continuation benefits are not proper offsets against no-fault wage loss benefits. Therefore, no knowledgeable underwriter even would have considered their availability as having any relevance to the issue of premium determination. Thus, Appellant's issue statement that Appellee *"enjoyed a reduced no-fault premium"* disingenuously suggests that Appellant is somehow entitled to a bargain (i.e., coordinating no-fault wage benefits with wage continuation benefits) that it never legally had available at the time it issued Appellee's coordinated no-fault insurance policy.

RELIEF REQUESTED

Appellant's desired result in this case was flatly rejected by the Legislature when it enacted §3109a. The Legislature expressly debated what the public policy would be with regard to §3109a, when it chose ***not*** to adopt the UMVARA section that did allow wage continuation plans to be set-off. Neither the Circuit Court nor the Court of Appeals erred in upholding over 19 years of appellate case law interpreting MCL 500.3107(1)(b) and 500.3109a which prohibits no-fault wage loss benefits from being reduced by wage continuation benefits that are paid gratuitously by an employer. The proper venue for Appellant's disagreement with the current version of §3109a is the State Legislature, which has the sole constitutional authority to amend the statute. Const 1963, Art 4, § 1.

SINAS DRAMIS LAW FIRM

SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

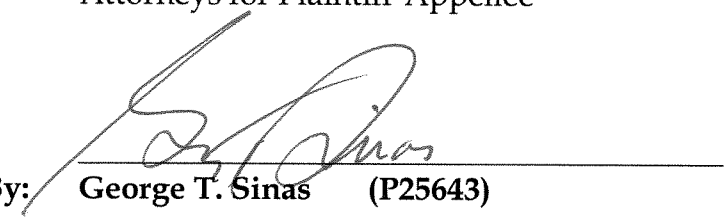
TELEPHONE 517-394-7500
FAX 517-394-7510

WHEREFORE, Plaintiff-Appellee, Arthur T. Jarrad, respectfully requests that this Honorable Court deny Defendant-Appellant's Application for Leave.

Respectfully submitted:

SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.

Attorneys for Plaintiff-Appellee



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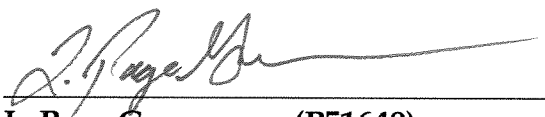

By: L. Page Graves (P51649)

3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500

Dated: **May 28, 2004**

SINAS DRAMIS LAW FIRM

SINAS, DRAMIS, BRAKE, BOUGHTON & McINTYRE, P.C.
3380 PINE TREE ROAD
LANSING, MICHIGAN
48911-4207

TELEPHONE 517-394-7500
FAX 517-394-7510